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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

No. 1078 90

THE TRUST COMPANY OF CHICAGO, ADMINISTRATOR OF THE ESTATE OF ELIZABETH PALMER SMITH, DECEASED, ET AL.,

Petitioners,

vs.

CITY OF CHICAGO, ET AL.,

Respondents.

Petition for Writ of Certiorari.

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To the Honorable Justices of the Supreme Court of the United States:

Petitioners, The Trust Company of Chicago, Administrator of the Estate of Elizabeth Palmer Smith, Deceased, Jason Paige, Executor of Estate of Carrie E. Paige, Deceased, and all other persons in like situation with reference to condemnation judgments against the City of Chicago, pray the issuance of a writ of certiorari to review the order of the Supreme Court of Illinois, rendered January 20, 1943 (Tr. 61) and adhered to March 9, 1943. Wherein on an appeal taken by your petitioners from the

Circuit Court of Cook County in Illinois, both of said courts ruled adversely upon and refused to consider the constitutional and federal questions which were properly stated and claimed and shown by the record and specially pleaded (Tr. 33-35: 67-77). The Circuit Court dismissed the complaints and the Supreme Court of Illinois transferred the appeal to the Appellate Court of Illinois, First District. That intermediate Appellate Court, under the Constitution and Statutes of Illinois, has no power to consider and pass upon constitutional questions. *Kowalczik* v. *Swift & Co.,* 317 Ill. 312; *People* v. *Davies,* 354 Ill. 168. The effect of said ruling and order of transfer by the Supreme Court of Illinois is to deny completely any forum whatever to appellants with reference to constitutional and federal questions which are presented by the record, and to erase all such questions from consideration by any court, other than on this review by Supreme Court of the United States. *Central Union Telephone Company* v. *City of Edwardsville,* 269 U. S. 190.

> "Appeals shall be taken directly to the Supreme Court in all cases in which a franchise or freehold or the validity of a statute or a construction of the constitution is involved." Section 75, Chapter 110, Civil Practice Act of Illinois.

STATEMENT AS TO JURISDICTION.

The Supreme Court of Illinois filed no opinion. The order (Tr. 61-62) was made upon oral announcement by the Chief Justice at the time of oral argument in that Court, without recess to chambers and without consideration at conference by said Court.

Motion and suggestions by appellants were promptly made (Tr. 62-77) to reverse said final order. That motion summarized and restated the constitutional and fed-

eral questions that had been presented to the Circuit Court of Cook County and the Supreme Court of Illinois (Tr. 67-77). That motion to reconsider was denied March 9, 1943 by the Supreme Court of Illinois (Tr. 78). Timely application for review by this court is made on June 7, 1943. This petition is presented in accordance with Section 237 (b) of the Judicial Code as amended, and Rule 38 of this Court as amended.

The Circuit Court of Cook County has general jurisdiction of all matters at law and in equity (Tr. 34). The Supreme Court of Illinois has exclusive jurisdiction to review constitutional questions, pursuant to Section 75 of the Practice Act of Illinois, and Article 6, paragraph 11 of the Constitution of Illinois (Tr. 75).

Your petitioners urge that the Supreme Court of Illinois by its order without any opinion, abdicated its constitutional duty to your petitioners to review and pass upon the constitutional and federal questions presented by this record to the Circuit Court of Cook County and to the Supreme Court of Illinois. That in so doing said Court arbitrarily seeks to change the inalienable and fundamental personal and property rights of your petitioners under the bill of rights of the Constitutions of the State of Illinois and the United States, into mere matters at the grace and permission of the Supreme Court of Illinois (Tr. 74-76). Also to change the obligatory jurisdiction of the Supreme Court of Illinois into merely discretionary jurisdiction. Thereby your petitioners were denied an obligatory hearing as to their vested rights, their contractual rights, and equal application of law, contrary to the fifth and fourteenth amendments of the Constitution of the United States. *People* v. *Kelly*, 361 Ill. 54 at 59, 60.

SUMMARY OF THE MATTER INVOLVED.

Elizabeth Palmer Smith filed in the Circuit Court of Cook County, her petition (Tr. 1) for writ of mandamus on October 23, 1933, to collect the balance of a condemnation judgment, entered in a local improvement proceeding in the County Court of Cook County, on June 2, 1922. The City of Chicago and necessary officials were named as respondents to that petition (Tr. 5), and they remain the defendants to this suit at the present time. The respondents, by their counsel, filed a general demurrer on November 30, 1933, which was argued on many occasions in the Circuit Court of Cook County (Tr. 8). In January 1934, respondents asked leave to withdraw the demurrer, and were given leave to file an answer, and later certain amendments to that answer. The plaintiff filed motions to strike the answer and the amendments. Those motions were argued on various occasions, before the Circuit Court of Cook County, but no order was entered.

On May 20, 1940, respondents sought leave to withdraw all their answers and defenses, and to file a motion to dismiss the suit upon the sole ground that some statute of limitation had run against the suit (Tr. 8). An affidavit was filed in support of that motion, and the plaintiff filed a counter-affidavit (Tr. 9). The petition for mandamus and that counter-affidavit present facts and issues which are substantially the same as those set forth by the separate count in chancery as hereinafter stated. To unify and simplify the petition we discuss the case in detail as stated by the count in chancery, below at page 7 ff.

In October 1941, Elizabeth Palmer Smith died, and the Trust Company of Chicago, as Administrator of her estate, was substituted as plaintiff, by order of court on November 12, 1941 (Tr. 9). On that date the respondents asked

leave to file an additional affidavit in support of their motion to dismiss (Tr. 12). The Trust Company of Chicago, as Administrator, filed a counter-affidavit and a motion to strike the motion of the defendants to dismiss, and to strike the affidavits in support of the motion by the defendants to dismiss (Tr. 9). These matters were briefed and argued, and the Circuit Court on January 12, 1942 overruled the motions made by the plaintiff, and sustained the motion made by the defendants to strike the complaint for mandamus, but gave leave for your petitioners to file a separate count in chancery within 10 days, and ruled that respondents answer within 10 days (Tr. 14).

Complaint in Chancery in Circuit Court.

The separate count in chancery (Tr. 15 ff) was filed on January 20, 1942 pursuant to the order of the court; as a class suit with the Trust Company of Chicago, as Administrator, one named plaintiff, and Jason Paige, Executor of the Estate of Carrie E. Paige, deceased, as another named plaintiff; and all other persons in like situation with reference to condemnation judgments against the City of Chicago, as additional plaintiffs. To this additional count in chancery, the respondents filed a new motion to dismiss the entire suit (Tr. 56). That motion was briefed and argued, and the suit was dismissed by final order April 21, 1942 (Tr. 56), by the Circuit Court of Cook County.

The facts of the case appear in the pleadings, and such of said affidavits as this court may determine to be material. No evidence was heard by the Circuit Court. All orders were entered by the motion judge. No written opinion has been filed.

On February 2, 1942, the plaintiffs filed a motion in writing in said Circuit Court, seeking relief *pendente lite*

pursuant to the complaint in chancery and the prayers thereof. By order of that date the motion was entered and continued (Tr. 54). That motion was denied also by the final order of Circuit Court on April 21, 1942 (Tr. 56) mentioned above at page 5.

From that final order this appeal was taken direct to Supreme Court of Illinois by notice filed June 30, 1942 (Tr. 57). The record was filed in that court on appeal August 28, 1942. The order of transfer (Tr. 61) by that court to the Appellate Court for the first district of Illinois, confirms that an effective appeal was taken in due time free from objection as to form and pursuant to statute.

The Basic Issue Before Illinois Courts.

The main question in this case before the Supreme Court of Illinois was the construction of article 2, section 13 as to just compensation, and article 9, section 12 as to prior provision for payment before municipal debt incurred, and article 6, section 12 as to powers and duties of Circuit Courts over trusts in chancery, and related provisions of the Constitution of the State of Illinois; as applied to the trust for purchase money determined by condemnation proceedings; and as asserted by pleadings for plaintiffs in this suit.

These constitutional questions were raised by the pleadings before the Circuit Court, were submitted to the trial judge, were ruled upon, and the adverse ruling was preserved for review in this record and duly presented to the Supreme Court of Illinois (Tr. 68).

By direct appeal to that Court your petitioners sought to obtain from that Court, the construction and application of specific provisions of the Constitution, to the situation where purchase money awards by condemnation judg-

ment were not paid promptly; but where, after a substantial period of delay, there is paid at most a sum equal to the original amount of the award, without the accrual of interest which arises automatically by passage of time under the judgment act (Section 7 of Chapter 77) and other statutes (Section 2 of Chapter 74) of the State of Illinois, and under the just compensation provisions and said other provisions of the Constitution of Illinois (Tr. 34). Your petitioners say that said provisions by statute and constitution have enlarged during the period of delay the amount of money secured by condemnation judgment lien and constitutional lien in favor of each property owner. *Jacobs* v. *United States*, 290 U. S. 13 at 16.

That reserved constitutional issue in this record, stated by both law and chancery procedure, raised substantial constitutional questions on review before the Supreme Court of Illinois, some of which it had never passed upon. That basis for liquidation of condemnation judgment by this record was presented for the first time to the Supreme Court of Illinois, in the form of a class suit in chancery, asserting in this record that there can be no satisfaction under the constitutional and statutory provisions, until both the accrued interest first, and the original amount of the judgment thereafter, have been paid in full to property owner, for land taken by eminent domain proceedings.

Basic Facts Stated by the Pleadings.

Paragraph (1) of the separate complaint in chancery filed by permission of the court, reads as follows:

> "The plaintiffs herein, were the owners of the real estate situated in the City of Chicago, condemned in part and damaged as to remainder of such parcel, by proceedings for condemnation, and thereby taken from the plaintiffs by force against their wills, but sub-

ject to duties of City of Chicago to pay just compensation, as provided by sovereign constitutions and statutes, which were made for the protection of plaintiffs: all as hereinafter more fully stated" (Tr. 15).

Paragraph (2) names the defendants and their several official titles, and states:

"All of said persons respectively and their successors in office, are *ex officio* active express trustees, of powers duties and funds, which are held by them for the plaintiffs, by reason of the facts hereinafter stated" (Tr. 16).

Paragraph (3) states that the plaintiffs bring this suit against the defendants so named (Tr. 16).

Paragraph (4) asserts that designated portions of the Constitutions of the State of Illinois and of the United States, are the basic rights giving rise to the duties of the defendants as trustees for the plaintiffs (Tr. 17).

Paragraph (5) relies upon specific portions of the Act concerning local improvements and other portions of the statutes as confirming fiduciary powers with which the defendants were and are vested for the benefit of plaintiffs (Tr. 17).

Paragraph (6) recites that the defendants being so vested with basic constitutional and statutory powers in trust, voluntarily undertook to exercise the same by the condemnation proceedings designated in this suit (Tr. 18).

Paragraphs (7) and (8) are as follows:

"(7) Many other like proceedings, and court judgments in condemnation, under Local Improvement Act or Eminent Domain Act, in favor of groups of persons, which include all other plaintiffs, and against defendant City of Chicago, for local improvement and

other purposes, were entered at the suit of the defendants in the County Court, the Circuit Court and the Superior Court of Cook County, after July first 1897, and before the filing of this complaint, as shown by the records of said courts, and further shown by a memorandum thereof, to be filed in this cause as an integral part of this complaint, pursuant to prayer (i) of this complaint. All of said proceedings are entered also upon the dockets and files of the City of Chicago and are well known to the defendants" (Tr. 19).

"(8) Defendants by their own voluntary acts, elected to have said courts enter the judgments of condemnation, which confirm awards of money to the plaintiffs, and against defendant City of Chicago personally and individually, in each and all of the suits for condemnation herein mentioned. Each judgment is personal and individual against the City of Chicago. None of said judgments was ever reversed or modified. Said judgments became and remain final and unconditional, as required by the constitution and as provided by Statute. The amount of each judgment as entered, became instantly a capital liability and obligation of said trust, under the constitution as hereinafter stated. Thereby said fiduciary and trust relationship became irrevocable, until payment to each plaintiff herein shall be fully made, with interest, costs and counsel fees as hereinafter stated" (Tr. 20).

Paragraph (9) says that upon the entry of the judgments in condemnation, plaintiffs became vested with unconditional rights to receive the compensation awarded, and

"Thereby the full faith and credit of the City of Chicago, was pledged and assigned in trust irrevocably, to secure and assure such payment, to each of present plaintiffs" (Tr. 21).

Paragraph (10) reads as follows:

> "These vested rights of the City of Chicago and the present plaintiffs, are reciprocal, correlative, and inseparable. From and after the entry of judgment in condemnation, the City of Chicago thereby was adjudged liable to perform all fiduciary duties, which it had accepted and assumed as herein stated, and was adjudged to hold in its control and possession, the just compensation and interest accruing thereon, in an active express trust for the sole beneficial use of each plaintiff respectively, until each shall be fully paid as herein demanded" (Tr. 21).

Paragraph (11) recites further steps in the condemnation proceedings, and the completion of all of the improvements (Tr. 22).

Paragraph (12) states the account between the defendants, and Trust Company of Chicago as Administrator of the estate of Elizabeth Palmer Smith, one of the plaintiffs. This account shows

> "Net balance of principal of judgment unpaid, Two Thousand Eight Hundred Nineteen and 57/100 ($2,819.57) Dollars, remaining due October 10, 1927 on the judgment."

and interest thereon to be computed (Tr. 22).

Paragraph (13) shows a like accounting against the defendants, and in favor of the Executor of the Estate of Carrie E. Paige, deceased, one of the plaintiffs:

> "Net balance of principal unpaid, Four Thousand Four and 62/100 ($4,004.62) Dollars, remaining due February 1, 1927 on the judgment."

and interest thereon to be computed (Tr. 23).

Paragraph (14) recites similar accountings for substantial sums of monies due from the defendants to each of

the plaintiffs by reason of unsatisfied condemnation judgments (Tr. 24).

Paragraph (15) states that all these monies due to the plaintiffs from the defendants, are due as part of the trusts established by the constitutions. It reads as follows:

> "*Trust to Pay Plaintiffs Pursuant to constitution.*
>
> "Said City of Chicago and said officials *ex officio*, as active express trustees, at all times herein concerned were so seized, vested and possessed of said enabling powers, and had accepted and assumed complementary duties, under said bills of rights, constitution and statutes in trust, that the named plaintiffs and all other persons in like situation, whose land was taken in part and damaged as to remainder of parcels, for said Local Improvements, shall be paid pursuant to enabling statutes, and pursuant to said judgments of condemnation, and pursuant to all statutes now in force concerning local improvements, and pursuant to the duties of active express trustees, according to the course of equity by the common law, which is preserved intact by Section 12 of Article 6 of the Constitution of the State of Illinois, and confirmed by many decisions of the Supreme Court of Illinois" (Tr. 24).

Paragraph (16) recites that defendants as trustees, in partial exercise of their trust duties, created the special assessment trust fund, which is described in the mandamus petition filed October 23, 1933, in this cause (Tr. 24 and 4).

Paragraph (17) recites that under section 22-13 of the Cities and Villages Act, the respondents have in charge an additional trust fund therein described, which is applicable to payment of balances due the plaintiff on their judgments (Tr. 25).

Paragraph (18) states that by section 22-14 of the Cities and Villages Act, interest accrued on judgments shall be paid when any principal is paid, and recites that Section 7, Chapter 77 (which is the judgment act) provides for interest at the rate of six per cent per annum, from the date of the recovery of any judgment "until the same is paid" (Tr. 26).

Paragraph (18) continues by declaring that the effect of the constitutions and statutes is to deprive the respondents of any discretion as to payment of interest; that it was and is the peremptory duty of the defendants to pay all interest that has accrued, before any sum could be credited on the principal of any condemnation judgment (Tr. 26).

Paragraph (19) recites the rulings made by Supreme Court of Illinois, and asserts that any failure to pay and credit interest before principal, would be a departure from the powers of the defendants, and wrongful departure from their trust duties (Tr. 27).

Paragraph (20) asserts wilful delays by the defendants for many years in making the payments, and asserts the inadequacy of the legal remedies as an important reason for this class suit in equity (Tr. 28).

Paragraph (21) asserts that by reason of the constitutional provisions, and the facts stated in the complaint, plaintiffs have a first and prior lien, as of the dates of the judgments, upon all available funds and property of the City of Chicago (Tr. 29).

Paragraph (22) reads as follows:

> "Also at all times herein concerned, the defendants by undertaking such trust relation as active express trustees, had accepted and assumed an affirmative duty to act in good faith, to make a faithful disclosure, frequent account, full discovery and accurate report

to the plaintiffs, with reference to all duties and obligations herein mentioned, of the City of Chicago and said official *ex officio*, as express trustees, including the prompt payment of interest as a part of just compensation, and with reference to what were and are, all the funds and property available to pay said principal, interest and just compensation to the plaintiffs" (Tr. 29).

Paragraph (23) shows in detail, the violations by defendants of their duties as such trustees, and their wilful attempts to defeat the vested and constitutional rights of the plaintiffs (Tr. 30).

Paragraph (24) sets forth acts of duress and other misconduct by the plaintiffs (Tr. 30).

Paragraph (25) shows that these acts and duress were so severe as to amount to fraud on the plaintiffs, and against their financial rights (Tr. 31).

Paragraph (26) shows that the releases, deeds and other vouchers, which the defendants coerced from some of the plaintiffs, are void and fraudulent and to be disregarded by this court of equity (Tr. 32).

Paragraph (27) refers to Section 22-15 to 20 of the Cities and Villages Act, as establishing additional $12,000,000 fund applicable to the payment of monies due to the plaintiffs (Tr. 32).

Paragraph (28) recites in detail the constitutional provisions which are relied upon by paragraph (4), and concludes as follows:

"The language of the constitution is peremptory, that the municipal authorities shall, before or at the time of incurring condemnation indebtedness, provide for the collection of a direct annual tax, sufficient to pay the interest and principal, of all just compensation

> indebtedness with interest and costs. That duty is paramount to all other duties. The municipal body is not authorized to apply to such purpose, only the money that may remain after paying other expenses, or after discharge of other appropriations. The City is commanded to liquidate entirely all judgments for just compensation, ahead of and prior to payment of any other judgments, or any other obligations or expenses whatsoever. All of said provisions of the Constitution of Illinois are self-executing, and are written into all proceedings and statutes affecting local improvements. To provide and pay the money is an irrevocable duty, which has been accepted and assumed by the defendants voluntarily. That constitutional duty is a continuing one, until full performance shall occur" (Tr. 33).

Paragraphs 29, 30, 31 and 32 set forth the history of this suit prior to the filing of count in chancery (Tr. 35-37).

Paragraph (33) shows that the failures by the defendants, as active express trustees, to pay the plaintiffs, is long continued and wilful, and renders the City of Chicago personally liable to pay the plaintiffs (Tr. 37).

Paragraphs 34, 35, 36, 37, 38, 39 and 40 recite further details of wrongful administration of the trusts by the defendants (Tr. 38-42).

Paragraph (41) shows that the defendants are presumed as matter of law, to have in hand the funds and monies sufficient to liquidate the claims of the defendants (Tr. 42).

Paragraphs (42) and (43) state in detail that this is a proper class suit. Those paragraphs read as follows:

> "By reason of events hereinabove stated, it has become necessary, and the plaintiffs have instituted and are maintaining this suit, on behalf of themselves

and on behalf of all other property owners herein mentioned, and on behalf of all property owners who have condemnation judgments as above mentioned, in any part unpaid. All such persons are made parties plaintiff as a class by description. The objects of the suit and the questions arising, are of common and general interest to all concerned. Said trust beneficiaries are numerous and constitute hundreds of former property owners, who are condemnation money judgment creditors, there being scores of properties condemned and hundreds of owners. They constitute a class so numerous as to make it impracticable, to bring them all by name at this time before this court. Their names and residences cannot be ascertained without great difficulty and delay. In some condemnation orders so obtained by the defendants, the plaintiffs were not named, but were described as 'owners.' The named plaintiffs fairly represent the interests of all herein. Wherefore the active plaintiffs are suing in behalf of all such persons who are plaintiffs by description" (Tr. 42).

"The named plaintiffs, and all other said former owners of real estate, which has been damaged or taken by condemnation, who are made plaintiffs as a class by description, have a common like and pro rata interest, in the subject matter of this suit, and to the funds composed from collections by the City of Chicago, which are herein described and drawn into court. Plaintiffs' rights are not antagonistic or adverse to each other. All of the plaintiffs are beneficiaries of said active express trust powers, trust duties and trust funds. All plaintiffs are entitled to share therein pro rata, and in proportion as their interests herein shall appear. There exists a common right sought to be enforced in this cause. The named plaintiffs undertake to represent the rights, of all such property own-

ers who now are beneficial owners, and to maintain and conduct, this suit as a representative class suit, for the benefit of themselves and all said former owners of real estate condemned. The named plaintiffs, invite all members of the class to appear in this action, and to make contribution by pro rata share, toward the costs and expenses of the same" (Tr. 43).

Paragraphs (49) and (50) (Tr. 47), are as follows:

"The active express duties of defendants, to levy assemble and distribute to the plaintiffs said trust funds, are so primary and so firmly established by said sections of the constitutions, that all power is withheld from the legislature, to make any statute of limitation applicable, to any facts or transactions mentioned in this complaint. In the alternative the plaintiffs say, that no facts or circumstances exist or have occurred, which are sufficient to start the running, of any statute of limitations, which the defendants might claim to be applicable to this suit."

"Any refusal by this court to give relief, to the plaintiffs as herein demanded and prayed, would be departure from the law of the land, and a denial of property and procedural rights, which are vested in the plaintiffs as stated in this complaint, and would be a denial to each of them, of due process under the constitutions and the decisions, which are hereinabove asserted for the protection of the plaintiffs."

Prayers for Relief in Complaint in Chancery.

Paragraph (51) are the prayers for relief (Tr. 48 ff.) including discovery, accounting and orders for payment of the sums found due to the plaintiffs, with appropriate attorneys' fees and costs, to be paid to the plaintiffs out of the funds mentioned in the complaint or to be pro-

vided in response thereto, and pursuant to the provisions of the constitutions (Tr. 48-53).

The record also includes a separate count making the same claim by petition for writ of mandamus. Of that pleading both the Circuit Court of Cook County (Tr. 34), and the Supreme Court of Illinois (Article 6, Section 2) have original jurisdiction by direct provision of the Constitution of Illinois.

Errors Relied Upon for Reversal in the Supreme Court of Illinois.

Appellants insisted before the Supreme Court of Illinois, "that the Circuit Court erred in striking the petition for mandamus; and erred in striking the count or complaint in chancery; and erred in dismissing the suit; and erred in sustaining each of the motions for the defendants; and erred in overruling the motions made by the plaintiffs; and erred in denying to plaintiffs relief asked for *pendente lite*, and erred in failing to rule that the default should be entered against the defendants on the petition for mandamus; and erred in failing to rule that the defendants must answer the count or complaint in chancery; and by each of said orders the court erred by denying to appellants their constitutional rights specifically demanded and set forth in this record, by both the petition for mandamus and the complaint in chancery." The constitutional reasons why said orders and rulings by the trial judge should be reversed were stated in the argument and briefs and the motion to reconsider (Tr. 67 to 77) in the Supreme Court of Illinois, and are renewed by this petition before this Court.

The Theory of Appellants in the Supreme Court of Illinois.

Condemnation proceedings provide a means of making a contract upon the court record for the purchase of real estate from an unwilling owner. All usual principles of equity and of chancery procedure which govern in ordinary sales of real estate, apply in the liquidation of that contract. Petitioners say that the judgment order is the signing of that contract, that the prior proceedings and the constitutional provisions are the terms of the contract. The seller and purchaser of real estate are trustees for each other in contracts off the court record, from the time that the contract is signed until it has been fully performed. Petitioners say that the same is true when purchase is made by condemnation, from the time when the judgment becomes final. The condemnor as purchaser of real estate is trustee for the purchase price from the date of such judgment until payment in full with interest has been made to the property owner. *Finn* v. *Wetmore*, 212 Ill. App. 550 at 553 and 554 and cases there cited.

The Supreme Court of Illinois has said in *Feldman* v. *City of Chicago*, 363 Ill. 247, 249 (assumpsit upon condemnation judgment):

> "The claim here was for a sum certain, depending only upon computation. Demand for interest was made at the time the judgment was paid. The amount of compensation was fixed by the judgment and the rate of interest was fixed by the Interest Act. No dispute could arise between the city and the property owner as to the amount to be paid, after the judgment became final and unconditional."

By section 32 of the Local Improvement Act of Illinois (Chapter 24:84-32), the duty to pay the purchase price is unconditional from and after date when the judgment

becomes final. Thereafter "no dispute could arise between the city and the property owners as to the amount to be paid." Petitioners say that by said provisions of the constitution, and by Section 1 of the Eminent Domain Act (Chapter 47), and by Section 30 of said Local Improvement Act, the taking does not become lawful and sufficient until payment has been fully made. It follows that all usual remedies by mandamus and in chancery are available to the property owner, as of course until his selling price with accruing interest, as determined by the judgment order and the Constitutions has been fully paid.

After printed briefs had been filed in the Supreme Court of Illinois, the case was reached for oral argument on January 20, 1943. The presiding Justice refused to permit a discussion on the merits of the appeal, but limited the argument to jurisdictional constitutional features. By oral announcement the appeal was disposed of at once without recess, and before passing to oral argument of the next case (Tr. 61). On the following day petitioners sought to file motion to reconsider, but were prevented by the sudden closure of the Court without any prior announcements. After some difficulty (Tr. 65-67) that motion with suggestions was filed, and was disposed of adversely to petitioners at the next term of Supreme Court of Illinois on March 9, 1943 (Tr. 78).

The Main Questions Presented by this Petition.

Whether obligatory jurisdiction may be evaded and renounced by Illinois Courts, under our constitutional system of government.

Constitution of United States, Art. VI, paragraph 2:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and

all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Whether the Illinois Courts by renouncing obligatory jurisdiction with which they are vested by the Constitutions, can thereby evade ruling upon the record as to constitutional matters presented to them by your petitioners, so that thereby your petitioners have been denied their property and freedom under the bills of rights.

Foregoing primary questions may be restated as follows:

Whether the Supreme Court of Illinois has choice to ignore and violate the bills of rights of the Constitutions of the United States and of Illinois, by its failure to provide clear and explicit rules governing proceedings before that court, particularly as to the manner of stating jurisdiction where constitutional questions are involved. Under the prevailing practice, that court has assumed the position that in ruling upon a case before it, it has power and discretion to decide or not to decide whether a constitutional question is involved. Litigants are thus deprived of their rights in that that court claims it may, (as in this case) merely transfer the case to the Appellate Court of Illinois without any opinion. Such practice results in a practical blockade of review by the United States Supreme Court, from such an order.

(Rules of Supreme Court of Illinois are printed in full form by Smith Hurd Illinois annotated Statutes, Chapter 110, Sections 259.1 to 259.71.)

Whether the Supreme Court of Illinois may debase the bill of rights and other provisions of the Constitution of Illinois into a bill of their discretions, by their varying and unpredictable manner of administration of Sections

75 and 86 of Illinois Civil Practice Act. Those sections read in part as follows:

> "Appeals *shall* be taken directly to the Supreme Court in *all cases in which* a franchise or freehold or the validity of a statute or *a construction of the constitution is involved.*" Section 75.
>
> "Where an appeal is taken to either the Supreme or Appellate Court and it is found or adjudged that the case was wrongly appealed to such court, it shall be the duty of such court to direct the clerk to transmit the transcript and all files therein with the order of transfer to the clerk of the proper court. On the receipt of such record the clerk shall at once file the same and the case shall then proceed as if the same had been taken there from the inferior court." Section 86.

In some transfers to Appellate Court, opinions are written, (a recent example is *Rittenberg* v. *Murmingham*, 381 Ill. 267), in others there is only the order, as in this record (R. 78). The absence of opinion attempts to blockade review by this court, and leaves indefinite what proceedings are intended to be conducted before the Appellate Court.

Whether the Circuit Court of Cook County and the Supreme Court of Illinois may disregard and deny to petitioners equal protection of the law, which had been announced and settled by at least five decisions of the Supreme Court of Illinois, prior to the time the suit at Bar was prepared and demand was made on October 20, 1933 (Tr. 77). Those decisions require reversal at bar.

Whether the Supreme Court of Illinois may deny to petitioners equal protection of the law, by its cryptic order and its failure to prepare and file an opinion, contrary to what it does in most cases where an order of transfer is made to the Appellate Court; thereby making

difficult by adverse judicial administration, the path of your petitioners to the Supreme Court of the United States.

Whether the Supreme Court of Illinois may deny to your petitioners equal protection of the law, by refusing any writ for enforcement of the judgment against a municipal body except by arbitrary discretion of the Supreme Court of Illinois (Tr. 74-76), whereas as against all other judgment defendants, writs of execution upon judgments issue in all courts of Illinois as of course, from the office of Clerk in every court. Compare current ruling on *scire facias* after judgment: *Bank of Edwardsville* v. *Raffaele,* 381 Ill. 486 at 487.

Whether the Supreme Court of Illinois may enforce provisions of the Constitution of Illinois with reference to recovery for property taken by condemnation by some litigants (*People ex rel. Louis Markgraff, et al., Appellees* v. *Rosenfield Director, Appellant,* No. 27083, 383 Ill. .....; *People* v. *Kelly,* 361 Ill. 54 at 59, 60) and arbitrarily refuse like relief to your petitioners (Tr. 67-76).

Whether the Supreme Court of Illinois, by any and all said action adverse to petitioners, may deny to them due process of law contrary to Section I, Amendment 14 of the Constitution of the United States.

Where as here the appeal is taken upon constitutional grounds, there exists no rule by the Supreme Court of Illinois as to manner for stating its jurisdiction. Standing rules of that court do not require specific mention in the briefs before that court, as to the matter of jurisdiction. The question of jurisdiction may arise orally or on motion before that court.

In the case at bar the respondents made no motion as to jurisdiction on this appeal, but filed a printed brief upon the merits of the case. There was no issue as to

jurisdiction before the Supreme Court of Illinois. That court made no special ruling for your petitioners to show cause in that court upon the matter of jurisdiction. The order does not say that that court acted upon its own motion. The order of transfer has no basis in the record. The order is merely arbitrary. That court of record proceeded orally. The failure by the Supreme Court of Illinois to provide clearly by rules governing proceedings before that court, as to manner of stating jurisdiction where constitutional questions are involved, results in uncertainty which that court uses to hear and decide, or not to hear or decide, a case presented, merely as a matter of grace and arbitrary discretion (Tr. 61).

Sometimes the Supreme Court of Illinois accepts and decides a case although no constitutional question or other matter for jurisdiction appears in the briefs or the opinion by that court. This occurred by rehearing denied March 11, 1943 (two days after said court refused to reconsider this case). That opinion is the case of *Wennerholm* v. *Wennerholm,* 382 Ill. 254. That (like the case at bar) was a trust fiduciary case.

While the Supreme Court of Illinois in recent years has fulminated against constitutional questions coming to that court, its remarks appear by opinions in many reports, nowhere stated in unit form, and never adhered to with any consistency or continuity by that court. The only clear principle which that court has stated is that jurisdiction vests in that court where the question is "so put in issue by the pleadings that the decision of the case necessarily involves a decision of such issue." *Winkelman* v. *Winkelman,* 345 Ill. 566 at 568. The pleadings do that in the record at bar. The briefs in the Supreme Court of Illinois carefully discussed those same federal and constitutional matters.

Prayer for Relief on This Petition.

Your petitioners submit that they did not receive *due process* of law nor *equal protection* of the law, in the Courts of Illinois in this case. The action of Supreme Court of Illinois was such as to call for review and reversal by the Supreme Court of the United States.

WHEREFORE, petitioners pray the allowance of a writ of certiorari to the Supreme Court of Illinois to the end that the cause herein may be reviewed and decided by this Court, and that the decree and orders herein by said Supreme Court of Illinois may be reversed, and for such relief as this Court may direct.

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